Supreme Court, U.S.
FILED

No.

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Supreme Court of the United States

October Term, 1996

ERIC ANTHONY ABRAHAMS,

Petitioner,

against

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a ROBIN MOORE, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. McKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY and ALEX KROLL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Has the U.S. Court of Appeals for the Second Circuit unduly restricted the scope of civil actions under the Racketeering Influenced and Corrupt Organizations Act ("RICO") and misconstrued Congressional intent in a manner which conflicts with previous holdings of this Court and the other Circuits by adopting an approach to the question of whether plaintiff was injured "by reason of a violation" of the statute which abandons common law proximate cause?

Does an individual suffering damage to his business interests from a bribery conspiracy's deliberate, but incorrect identification of him as a bribe recipient have a claim under civil RICO against the conspirators who made him the specific target of the scheme, that is, the person sought to be bribed?

PARTIES TO THE PROCEEDING

The petitioner, who was plaintiff and appellant below, is Eric Anthony Abrahams.

The respondents, who were respondents and appellees below, are Young & Rubicam Inc. ("Y & R"), Arthur Klein, Thomas Spangenberg, Steven McKenna, Mike Slosberg, Edward J. Daley, Edward Ney and Alex Kroll. According to representations to the Court below, Young & Rubicam Inc. has no subsidiary or affiliate that has issued shares to the public.

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No. 96-

IN THE
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ERIC ANTHONY ABRAHAMS,

Petitioner,

-against-

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a ROBIN MOORE, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. MCKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY AND ALEX KROLL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Eric Anthony Abrahams ("Abrahams") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (1a) is reported at 79 F.3d 234 (2d Cir. 1996). The opinion of the District Court (20a) is reported at 793 F.Supp. 404 (D. Conn. 1992).

JURISDICTION

The judgment of the Court of Appeals affirming the District Court's dismissal of plaintiff's civil RICO claim was entered on March 8, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

18 U.S.C. Sec. 1964(c) provides in pertinent part:

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor.

STATEMENT OF THE CASE

This appeal arises from the District Court's dismissal, pursuant to FRCP 12(b)(6), of petitioner's complaint alleging claims for relief under 18 U.S.C. Sec. 1964(c) and the Connecticut Unfair Trade Practices Act ("CUTPA") along with claims sounding in common law negligence and defamation. Federal jurisdiction of the civil RICO claim is based on 28 U.S.C. Sec. 1331 and over the remaining claims on 28 U.S.C. 1332(a)(2).

The essential facts giving rise to these claims, as alleged in the complaint and summarized by the Court of Appeals are, as follows:

> Abrahams was once the Minister of Tourism and Information for the Government of Jamaica. He also had a private consulting business and other business interests. Y & R, an advertising firm, embarked on a scheme to bribe Abrahams in order to secure the Jamaican Tourist Board ("JTB") advertising account. The plot was hatched by Arnold Foote, a Jamaican, and his associate Robert Lowell (a/k/a Robin) Moore, an American writer with connections in Jamaica. In the early 1980's, Foote and Moore approached Y & R, holding themselves out as "consultants" to the Jamaican government and claiming that they could obtain the JTB advertising account for Y & R by bribing Abrahams. As a result, Y & R paid a total of almost one million dollars to Foote and Moore, most of which was to be funneled to Abrahams. However, Abrahams was never involved in the scheme, and Moore and Foote kept the bribe money for themselves.
>
> Abrahams learned of the scheme only when he, Y & R and others were indicted in the District of Connecticut on October 6, 1989. Y & R pleaded guilty under the Foreign Corrupt Practices Act, 15 U.S.C. Sec. 78dd-2 to one count of conspiracy to bribe foreign officials. At the plea colloquy, Y & R conceded that there was "no evidence" that any of the money it paid ever actually went to Abrahams. The government thereafter dropped charges against the other defendants including Abrahams, who at all times maintained his innocence.

(3-4a)

In the civil action Abrahams claimed injuries to his reputation and emotional, financial, political and social status as a result of the dissemination of false information about his role in the bribery scheme. He also sought damages for the resultant destruction of his consulting business and other business interests. The District Court dismissed the RICO, CUTPA and common law negligence claims on the grounds that the acts alleged were not the proximate cause of Abrahams injuries. Abrahams's defamation claim was dismissed on other grounds. The Court of Appeals affirmed the dismissal of the RICO claim, reversed the dismissal of the common law negligence and defamation claims, and certified the CUTPA claim to the Connecticut Supreme Court for determination of the proximate cause and related issues. The Court of Appeals held that facts could be proven which would support a claim sounding in negligence that Y & R "hatched a scheme that, if exposed, would injure an innocent person in Abrahams's circumstances." With regard to the RICO claim, however, the Court of Appeals held that, the existence of proximate cause (linking the acts alleged to have been committed by Y & R and the injuries to plaintiffs business and property) notwithstanding:

> . . . RICO was not intended to protect plaintiffs such as Abrahams from the harm that befell him and [that] his complaint fails to allege a claim for relief under RICO.

(10a) The Court of Appeals stressed that Abrahams was not the target of the Racketeering enterprise—the bribery scheme—and that:

> . . .Abrahams's injuries "did not flow from the harms that the predicate acts—bribery, kickbacks, extortion, fraud—were intended to cause and the laws against them were intended to prevent.

(9a)

REASONS FOR GRANTING THE WRIT

The writ should be granted to review the actions of the Court of Appeals for the Second Circuit in adopting an approach to the question of causation in civil RICO actions which conflicts with other Circuits and with the approach taken by this Court in *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1317-18 (1992). Without precedent in case law or guidance from the legislative history, the Court of Appeals has abandoned the use of proximate cause as an analytic tool for determining whether illegal acts give rise to civil liability. In so doing, it has denied this plaintiff relief and other plaintiffs in the Second Circuit guidance as to whether they have a viable claim.

In a line of cases beginning with *Sperber v. Boesky,* 849 F.2d 60 (2d Cir. 1988), the Court of Appeals for the Second Circuit imposed more and stringent requirements for a finding of proximate cause in an obvious effort to narrow the scope of civil RICO.[1] In *Sperber, supra,* it was held that persons who allegedly purchased stock at an inflated value as a result of defendant's action could not recover because defendant "had no duty to protect plaintiffs from the effects of his racketeering." *Id.*, at 62. In *Hecht v. Commerce Clearing House,* 897 F.2d 21 (2d Cir. 1990) recovery was denied to an employee of defendant who was fired for refusing to participate in racketeering activities:

> . . . Because Hecht was 'neither the target of the racketeering enterprise nor the competitor [] nor the customer

---

[1]It is to be remembered in this regard that in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) this Court reversed a holding by the Second Circuit which imposed requirements of a prior conviction for the predicate acts and "injury caused by the activity RICO was designed to deter" before a civil RICO action could be commenced.

> [] of the racketeers] . . .,' the injury to Hecht . . . was not reasonably foreseeable as a natural consequence of the RICO violations."

In *In re American Express Co. Shareholder Litig.*, 39 F.3d 395, 399-400 (2d Cir. 1994), it was held that alleged RICO violations were not the proximate cause of injury to shareholders because the latter were "not the intended targets of the RICO violations."

While the method of analysis in these cases appeared to derive from the application of traditional principles of proximate cause, the results were strikingly different from those in other circuits. Thus, in *Alexander Grant and Company v. Tiffany Industries Inc.*, 742 F.2d 408 (8th Cir. 1984) recovery was allowed for an accounting firm who incurred increased expenses for the auditing of defendant because of the latter's RICO violations. In *Terre du Lac Association v. Terre Du Lac., Inc.*, 772 F.2d 467 (8th Cir. 1985) a property owners' association was allowed to recover from a developer for fraudulent acts which increased the maintenance costs of its members. In neither of these cases were plaintiffs the targets of the RICO scheme. In *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988) members of a union local were allowed to recover under RICO because fraudulent acts of the local's leadership directed towards persons other than local members substantially weakened the local to the detriment of plaintiffs. Contrast this result to that in *American Express, supra*, where shareholders could not recover for damage to the company caused by illegal acts of high ranking company officials.

In deciding the case at bar, the Court of Appeals was faced with a situation where the application of traditional principles of proximate cause could only result in allowing recovery. Respon-

dent's bribery scheme was organized in so reckless a way (through the payment of money to intermediaries whose representations that the money reached petitioner were taken at face value), it was a foreseeable consequence that the scheme's exposure would injure an innocent person in petitioner's situation. Indeed, the Second Circuit so held when it reinstated the common law negligence claim. (12a) Moreover, it is respectfully submitted that, the Court below's holding to the contrary notwithstanding, petitioner was indeed the target of the bribery scheme, to wit, the putative bribee. Thus, it was necessary for the Court below to seek to place the question of what and whose injuries the perpetrator of civil RICO predicate acts is liable for on a different footing. It is for this reason that the Second Circuit invoked the following wholly new standard:

> . . . With statutory claims, the issue is, instead, one of statutory intent: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid. *See Gorris v. Scott,* L.R. 9 Ex. 125 (1874) (preamble of statute made clear that the "mischief" the statute sought to prevent was only disease and did not encompass the risk of losing sheep off the side of a ship.)

(7a) No other precedent is cited. Nor is there any reference to the legislative history of the RICO statute.

In abandoning the principles of proximate cause,[2] the Second Circuit not only finds itself alone among the Courts of Appeals, but at odds with this Court as well. In *Holmes v. Securities Investor Protection Corp.*,112 S.Ct. 1311, 1317-18 (1992), Justice Souter, writing for the majority, states:

> The reasoning applies just as readily to Sec. 1964(c). We may fairly credit the 91st Congress which enacted RICO, with knowing the interpretation federal courts had given to words earlier Congresses had used first in Sec. 7 of the Sherman Act, and later in the Clayton Act's Sec. 4. It used the same words, and we can only assume it intended then to have the same meaning that courts had already given them. Proximate case is thus required.
>
> Here we use "proximate cause" to label generically the "judicial tool used to limit a person's responsibility for the consequences of his own acts. At bottom, the notion of proximate cause reflects "ideas of what justice

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[2]Footnote three of the Court of Appeals decision specifically rejects the use of proximate cause. The footnote concludes:

> . . . Were such a statute in issue, substantial problems could arise from the continued use of "proximate cause" language to define when plaintiffs are meant by the legislature to be given a cause of action. It is for these reasons, as well as a reluctance to give the same term "proximate cause" two different meanings unnecessarily, that we choose to describe the question before us in terms of what we think it has always involved, rather than by the language frequently used.

> demands and what is administratively possible and convenient". . .

(citations omitted) The concurring opinion of Justices O'Connor, White and Stevens (*Id.*, at 1322) and that of Justice Scalia, *Id.*, at 1327 also employ proximate cause analysis and principles.

The Eleventh Circuit employs these principles in construing civil RICO. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) ("It is well established that RICO plaintiffs must prove proximate causation in order to recover"); *O'Mally v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989) ("Therefore, by there own allegations, the proximate cause of plaintiff's injuries . . ." Likewise, the Eighth, *Beiter Co. v. Blomquist*, 987 F.2d 1319, 1325 (8th Cir. 1993) ("The Supreme Court has construed the "by reason of" language to incorporate the traditional requirements of proximate or legal causation. . . "; the Seventh, *Mendelovitz v. Vosicky*, 40 F.3d 182, 184 (7th Cir. 1994) ("Thus, because courts presume Congress to intend that language used in one place will have the same meaning when used in another, Section 4 [of the Clayton Act] contains a proximate cause requirement. So it is with RICO. . .") the Sixth, *Kaufman v. Seidman*, 984 F.2d 182 (6th Cir. 1993) (finding of no proximate cause in state claim precludes such a finding in civil RICO action); the Fifth, *Whalen v. Carter*, 954 F.2d 1987, 1091 (5th Cir. 1992) (". . . a plaintiff has statutory standing to bring a claim as long as the defendants' predicate acts constitute both a factual and proximate cause of plaintiff's alleged injury"); and Fourth, *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) ("Causation principles generally applicable to tort liability must be considered applicable).

In passing the RICO statute Congress was informed by the Clayton and Sherman Acts and centuries of common law efforts to grapple with the concept and application of proximate cause. The Second Circuit rejects this history in the name of "statutory intent." However there is no indication of any such intent and, indeed, much indication that the statute was written to incorporate common law principles of proximate cause. The Second Circuit has entered unchartered waters without any navigational tools except, perhaps, a divining rod to discover what the drafters of the civil RICO statute intended to require for recovery (other than proximate cause) when the drafters themselves give no indication that anything other than the principles of proximate cause is to be applied.

RICO is too important and controversial a statute, and this Court's efforts to insure uniform and proper construction too strenuous, to allow the result below and its rationale to remain.

CONCLUSION

For the reasons stated, the writ should be granted.

Dated: New York, NY
May 28, 1996

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit Decided March 8, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1314—August Term, 1994

(Argued: July 20, 1995 Decided: March 8, 1996)

Docket No. 94-7802

ERIC ANTHONY ABRAHAMS,

Plaintiff-Appellant,

—v.—

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a ROBIN MOORE, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. McKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY and ALEX KROLL,

Defendants-Appellees.

Before:

WINTER, LEVAL, and CALABRESI,
Circuit Judges.

Appeal from an order by the United by the United States District Court for the District of Connecticut (Peter C. Dorsey, *Chief Judge*), dismissing a complaint alleging claims based on RICO, the Connecticut Unfair Trade Practices Act ("CUTPA"), intentional infliction of emotional distress, negligence, and defamation.

Dismissal of the RICO and intentional tort claims is affirmed; dismissal of the negligence and defamation claims is reversed. We sever and certify the CUTPA claim to the Connecticut Supreme Court.

HARRY KRESKY, New York, New York (Terrence P.O'Leary and Francis W. Wood, of Counsel), *for Plaintiff-Appellant.*

STEPHEN S. MADSEN, Cravath, Swaine & Moore, New York, New York (Thomas D. Barr, of counsel), *for Defendants-Appellees Young & Rubicam Inc., Arthur Klein, Thomas Spangengerg, Steven M. McKenna, Mike Slosberg, Edward J. Daley, Edward Ney, and Alex Kroll.*

WINTER, *Circuit Judge:*

Eric Anthony Abrahams, a citizen of Jamaica, appeals from Chief Judge Dorsey's dismissal of his complaint. The complaint asserted claims against Young & Rubicam Inc. and various employees (collectively "Y & R"), Robert Lowell Moore a/k/a

Robin Moore, and Frederick Sturges,[1] based on alleged violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et seq.*, common law intentional infliction of emotional distress, negligence (including the negligent infliction of emotional distress), and defamation. We affirm dismissal of the RICO and intentional infliction of emotional distress claims; we reverse the dismissal of the negligence and defamation claims. We certify the CUTPA claim to the Connecticut Supreme Court.

BACKGROUND

Although Abrahams's complaint appears to have been drafted by counsel, this action has been essentially prosecuted, *pro se*, until counsel drafted a reply brief and argued the appeal in this court. The essential allegations of the complaint were as follows. Abrahams was once the Minister of Tourism and Information for the Government of Jamaica. He also had a private consulting business and other business interests. Y & R, an advertising firm, embarked on a scheme to bribe Abrahams in order to secure the Jamaican Tourist Board ("JTB") advertising account. The plot was hatched by Arnold Foote, a Jamaican, and his associate Robert Lowell (a/k/a Robin) Moore, an American writer with connections in Jamaica. In the early 1980's, Foote and Moore approached Y& R, holding themselves

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[1]The status of appellee Frederick Sturges is unclear. The docket sheet indicates that he is represented by the same counsel that represents Y & R. However, it appears that Sturges is not a Y & R employee, and the Y & R brief does not list him as one of the parties on whose behalf the brief was submitted. No papers were submitted on his behalf. We leave his status to amplification in further proceedings.

out as "consultants" to the Jamaican government and claiming that they could obtain the JTB advertising account for Y & R by bribing Abrahams. As a result, Y & R paid a total of almost one million dollars to Foote and Moore, most of which was to be funneled to Abrahams. However, Abrahams was never involved in the scheme, and Moore and Foote kept the bribe money for themselves.

Abrahams learned of the scheme only when he, Y & R, and others were indicted in the District of Connecticut on October 6, 1989. Y & R pleaded guilty under the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2, to one count of conspiracy to bribe foreign officials. At the plea colloquy, Y & R conceded that there was "no evidence" that any of the money it paid ever actually went to Abrahams. The government thereafter dropped charges against the other defendants, including Abrahams, who at all times maintained his innocence.

Abrahams then brought the instant action, claiming injuries to his reputation and to his emotional, financial, political, and social status resulting from widespread public dissemination of false information about his role in the bribery scheme. He also sought damages for the resultant destruction of his consulting business and other business interests. The district court granted the defendants' motion to dismiss the complaint, except for two defamation claims against Moore. *Abrahams v. Young & Rubicam, Inc.*, 793 F. Supp. 404, 408 (D. Conn. 1992). It dismissed the RICO claim on the ground that the predicate acts alleged were not the proximate cause of Abrahams's injuries, *id.* at 407, and found a similar lack of causation between the alleged CUTPA violations and Abrahams's injuries. *Id.* With regard to the negligence and intentional infliction of emotional distress claims, the district court held that the indictment was the cause of Abraham's injuries and could not be the basis for his claims. *Id.* The district court dismissed the defamation claims against Y & R on the ground that the defamatory statements were either

made to law enforcement authorities and thus privileged or were internal communications within Y & R and therefore not published. *Id.* at 407-08. The motion was denied with regard to the two defamation claims against Moore. *Id.* at 408.

On March 22, 1994, the district court ordered Abrahams to appear for a deposition pertaining to the two remaining claims against Moore. Abrahams requested that the defamation claims against Moore be dismissed without prejudice or that he be allowed to amend his complaint to drop those claims so that he could appeal the dismissal of the claims against Y & R. He explained to the court that the dismissal of his other claims "placed [him] both procedurally and financially in a very difficult position" and that forcing him to come to the United States for a deposition would "force [him] to expend [his] limited funds solely as against defendant Moore," against whom a judgment might be uncollectible. However, on June 15, 1994, the court dismissed with prejudice, pursuant to Federal Rule of Civil Procedures 37(b)(2)(C) and 41(b), the remaining claims against Moore as a sanction for Abrahams's failure to appear for a deposition.

Abrahams then appealed. Neither his *pro se* main brief nor a reply brief filed on his behalf by counsel discussed the propriety of the dismissal of the claims against Moore, and we deem them waived.[2]

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[2]We could not reinstate the claims against Moore without affording him an opportunity to respond to arguments regarding why the dismissal as a sanction was inappropriate and why the complaint states a claim(s) for relief against him. Because the first issue was not argued either by Abrahams *pro se* or by counsel in his reply brief, and the second was argued only by implication, we would have to draft those arguments *sua sponte* so that Moore might respond. Given Abraham's representations to the district court that he was willing to abandon the claims against Moore and the failure to

DISCUSSION

Abrahams's claims fall into two categories: statutory claims under RICO and CUTPA, and common law claims. We address these in turn.

A. *Statutory Claims*

In a "suit on statute"—that is, a suit in which the statute itself grants the recovery, creates the jurisdiction, or permits special damages—the plaintiff must show both that he is within the class the statute sought to protect and that the harm done was one that the statute was meant to prevent. *See* W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 224-25 (5th ed. 1984) (hereinafter PROSSER & KEETON) (in order to maintain an action based on a particular statute, a plaintiff must bring himself within the class of individuals the legislature intended to protect, and the harm must be one that the statute was intended to prevent); *see also Gorris v. Scott,* L.R. 9 Ex. 125 (1874) (no liability for the loss of sheep washed overboard in a storm, because the purpose of the statute requiring shipboard pens was to prevent disease, not to prevent sheep from being swept overboard).

These requirements are frequently discussed in terms of causation. *See, e.g., Holmes v. Securities Investors Protection Corp.,* 503 U.S. 258, 265-70 (1992) (to establish injury to business or property "by reason of" a RICO violation, a plaintiff must allege that the predicate acts both factually and proximately caused his injury): *In re American Express Co. Shareholder Litig.,* 39 F.3d 395, 399-400 (2d Cir. 1994) (alleged RICO violations were not the proximate cause of losses by American Express shareholders, because the shareholders were

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make pertinent arguments here, we deem the claims waived.

"not the intended targets of the RICO violations"). But liability, although discussed under the rubric of causation, does not turn on the existence of factual, but-for-causation. Nor does it depend on whether there is proximate causation as that term is used at common law. At common law, so long as the plantiff is foreseeable, there is no requirement that the risk of injury to the plaintiff, and the risk of the harm that actually occurred, were what made the defendant's actions wrongful in the first place. With statutory claims, the issue is, instead, one of statutory intent; was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid. *See Gorris v. Scott,* L.R. 9 Ex. 125 (1874) (preamble of statute made clear that the "mischief" the statute sought to prevent was only disease and did not encompass the risk of losing sheep off the side of a ship).[3]

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[3]The courts that have employed causation language used that language to ask precisely the same questions that we ask—that is, was the plaintiff in the category of people meant by the statute to be safeguarded, and was the harm that which the act meant to avoid? *See, e.g., Holmes,* 503 U.S. at 265-70; *American Express,* 39 F.3d at 399-400; *Hecht v. Commerce Clearing House, Inc.,* 897 F.2d 21, 24 (2d Cir. 1990); *Sperber v. Boesky,* 849 F.2d 60, 64-65 (2d Cir. 1988). It may therefore seem that the difference in ways of speaking is of no significance. In one sense, that is true. And the results of all the cases cited are completely consistent with the result we reach today.

But the difference in terminology is nonetheless important. First, use of "no proximate cause" language as the ground for dismissal in statutory cases frequently leads to confusion when the issue of proximate cause is raised in related common law claims. Thus, the district court in the case before us, after analyzing the RICO claim in terms of proximate cause, also dismissed the negligence claim "for the reasons previously adduced" with respect to RICO. *See Abrahams v. Young & Rubicam,* 793 F. Supp. 404, 407 (D. Conn.

We therefore now turn to the question of whether RICO and CUTPA were intended by the legislatures that enacted them to protect Abrahams from the harms he alleges.

1. RICO

Abrahams's complaint sought relief under RICO, 18 U.S.C. §1964(c), which allows recovery of treble damages and fees by a plaintiff "injured in his business or property by reason of a violation of [the substantive RICO statute.]" *Id.* To state a valid RICO claim, Abrahams had to allege, *inter alia,* the commission of two or more predicate acts constituting a "pattern of racketeering activity." 18 U.S.C. §1961(5). To that end, Abrahams

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1992). Second, even if courts or commentators recognize the different meaning that proximate cause (as they use it) has in statutory contexts, as against common-law settings, confusion is likely. Thus, it is easy to think that proximate cause runs further at common law than it does in statutory cases. But this is true only if, as is usually the case, the statutory intent is narrower than the common law rules governing the existence of proximate cause. That is not necessarily the case, however. Thus, at common law, since *Palsgraf v. Long Island Railroad*, 248 N.Y. 339 (1928), liability will typically not be found if the category of plaintiff is unforeseeable. Statutory liability is usually more limited, since usually a statute intends to protect only some categories of plaintiff among the large number of foreseeable ones. But, conceivably, some statutes might go beyond the common law and create rights of recovery for plaintiffs who are not foreseeable and who are injured by defendants' wrongdoing. A legislature could do so if it wished. Were such a statute in issue, substantial problems could arise from the continued use of "proximate cause" language to define when the plaintiffs are meant by the legislature to be given a cause of action. It is for these reasons, as well as reluctance to give the same term "proximate cause" two different meanings unnecessarily, that we choose to describe the question before us in terms of what we think it has always involved, rather than by the language frequently used.

alleged forty-one predicate acts in violation of New York and Connecticut law. All of these acts involved the bribery conspiracy.

The relationship between the predicate acts and Abrahams's injuries is analogous to that of other RICO plaintiffs to whom we have denied relief. *See American Express,* 39 F.3d at 400 (RICO violations do not give rise to recovery by American Express shareholders because they were "not intended targets of the RICO violations"); *Hecht,* 897 F.2d at 24 (no recovery for employee's loss of his job and of anticipated commissions because he refused to aid and abet his employer's RICO violations); *Sperber v. Boesky,* 849 F.2d 60, (4-65 2d Cir. 1988) (no RICO recovery by plaintiff investors whose share values declined in the wake of arbitrageur Ivan Boesky's plea of guilty to insider trading).

Abraham's failure to establish a RICO claim stems from the fact that he was not "the target of the racketeering enterprise." *American Express,* F.3d at 399 (quoting *Sperber,* 849 F.2d at 65); *see also Hecht,* 897 F.2d at 24. That is to say, Abrahams's injuries did not flow from the harms that the predicate acts—bribery, kickbacks, extortion, fraud—were intended to cause and the laws against them were intended to prevent. *See* PROSSER AND KEETON § 36, at 224-25. The Y & R scheme was designed to corrupt the process by which the JTB advertising contract was let and to disadvantage Y & R's rivals for that contract. The laws in question were not designed to prevent such conduct. Abrahams was neither an intended target of the scheme nor an intended beneficiary of the laws prohibiting it.

In *American Express,* we addressed closely analogous circumstances and held that a complaint failed to allege a RICO violation. That decision involved a scheme in which American Express published defamatory information about a commercial rival. *Id.,* 39 F.3d at 396-98. The scheme was designed to

impede the rival's quest for a license allowing it to enter the Swiss banking market in competition with a bank owned by American Express. *Id.* After the scheme was exposed, American Express paid $8 million in settlement. *Id.* at 398. The appeal was from the dismissal of a derivative action against American Express management for damages to the corporation. We held that "the shareholders of American Express were certainly not the intended targets of the RICO violations." *Id.* at 400. Rather, the targets were a competitive rival and the Swiss Regulatory authorities. The harm to the shareholders was caused by the public exposure of the scheme and not by the scheme itself. *Id.* Similarly, Abrahams was not the target of Y & R's scheme. Instead, the targets were Y & R's commercial rivals, the JTB, and the Jamaican government. Abrahams was injured, as were the shareholders in *American Express,* by the fallout from the scheme's exposure.

We conclude, therefore, that RICO was not intended to protect plaintiffs such as Abrahams from the harm that befell him and that his complaint fails to allege a claim for relief under RICO.

2. CUTPA

CUTPA prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). It allows "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [the Act to] bring an action . . . to recover actual damages." Conn. Gen. Stat. §42-110g(a).

The claim before us is rather unusual. Bribery to obtain a commercial advantage is surely an unfair trade practice. Abrahams alleges that he was injured by the bribery scheme in his various roles as a public official and a private businessman.

The district court held that Abrahams could not recover because, as it had held with regard to the RICO claim, the CUTPA violation and Abrahams's injuries were not causally related. There is no dispositive Connecticut case law as to whether CUTPA protects a person in Abrahams's position against the harm that befell him. Any decision of that issue would involve setting parameters on CUTPA claims that might affect numerous other factual situations. We are reluctant to put either a narrowing or expanding gloss on the statute; not only might it misconstrue Connecticut law, but it might also lead to forum shopping to achieve or avoid federal disposition of unusual CUTPA claims. We therefore sever the CUTPA claim and certify it to the Connecticut Supreme Court by a separate order of this court.

B. *Common Law Claims.*

We next address Abrahams's common law claims.

1. Intentional Infliction of Emotional Distress

Abrahams's complaint fails to allege that the appellees intended to injure him. His claim for the intentional infliction of emotional distress was thus properly dismissed.

2. Negligence

The district court dismissed Abrahams's negligence claims also on causation grounds. The court stated that although Abrahams alleged that appellees knew or should have known that their actions would injure him, "it is . . . the indictment and events surrounding it that resulted in plaintiff's harm. While it is clear that the decision by the United States Attorney to indict plaintiff cannot be the subject of a negligence . . . claim, neither

can defendants' original commission of illegal acts, for the reasons previously adduced [with regard to RICO]." *Abrahams*, 793 F. Supp. at 407. We disagree.

We are unable to say that Abrahams can prove no set of facts based on his complaint that would entitle him to relief on his negligence claim. First, the RICO ruling is not dispositive of a negligence claim. As noted, RICO is a statute designed to protect certain classes of persons from particular kinds of harms. In the case of a claim based on the violation of a statute, a plaintiff who is either outside the class of beneficiaries or not a victim of the kind of injury the legislation was intended to prevent cannot assert a valid claim. *See* PROSSER & KEETON §36, at 224-27. However, the duty to act with reasonable care establishes a general standard of conduct and is not limited to protecting certain classes of persons from particular kinds of harms. Appellees are alleged to have hatched a scheme that, if exposed, would injure an innocent person in Abrahams's circumstances. At this stage of the proceeding, we cannot say that no set of facts can be proven under such an allegation that would support an award for legally cognizable damages. Given the infancy of this matter and the recent entry of new counsel to represent Abrahams, we decline to analyze this claim further.

Second, we are unclear as to the district court's thinking regarding the damage caused by the indictment. We cannot tell whether the court regarded the indictment as an intervening force relieving appellees of their responsibility for the results of their negligence, *see* RESTATEMENT (SECOND) OF TORTS §441; PROSSER & KEETON §44, or whether it believed that as a matter of law a private party cannot be liable for damages resulting from a negligently caused indictment. Moreover, it is unclear why the court believed that damages cannot be recovered for negligently caused "events surrounding" an indictment, whatever they may be. *See Abrahams*, 793 F. Supp. at 407.

Again, we comment no further but leave development of these issues to further proceedings in the district court.

3. Defamation

Abrahams alleged defamation by Y & R and some of its employees for stating that Abrahams had demanded bribe money and had in fact been bribed. The district court applied Connecticut defamation law in dismissing these claims, holding that all the alleged statements were either: (1) privileged because they were made in the course of judicial proceedings, or (2) unpublished because they were made within the corporate confines of Y & R. *Abrahams*, 793 F. Supp. at 407-08. It then dismissed the defamation claims. *Id.*

We agree that statements by Y & R personnel to the Internal Revenue Service, the grand jury, and the United States Attorney's Office are privileged because they were made in the course of judicial proceedings. *See id.* (citing *Petyan v. Ellis*, 200 Conn. 243 (1986)). However, a recent decision of the Connecticut Supreme Court has undermined the district court's conclusion that the statements circulated within Y & R were not "published" for purposes of a defamation claim. Connecticut, like New York,[4] now recognizes that dissemination of a defamatory communication among employees of a corporation can constitute the requisite publication. *See Torosyan v. Beohringer Pharmaceuticals, Inc.*, 234 Conn. 1, 27-28, 662 A.2d 89, 103 (1995) (allegedly defamatory statement included in personnel file constitutes "publication"); *see also Kennedy v. Butler*, 245 N.Y. 204, 156 N.E. 666 (1927) (permitting libel

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[4]Neither the district court nor the parties fully addressed the questions of choice of law or statute of limitations. We must in any event remand and therefore also do not address them other than to flag their existence for further proceedings.

action based on circulation of allegedly defamatory letter by corporation to its store managers). In supplementary letter briefs, appellees acknowledge that a publication may thus have occurred when a 1983 memorandum discussing Abrahams and the bribery scheme was circulated among Y & R's employees in New York. Whether there were yet other defamatory statements published does not matter at this stage because we must reverse.

CONCLUSION

We affirm dismissal of the RICO claim. We sever the CUTPA claim and certify it to the Connecticut Supreme Court. We affirm the dismissal of the intentional infliction of emotional harm claim. We reverse the dismissal of the negligence and defamation claims. Because we believe that the disposition of the certified question by the Connecticut Supreme Court will not affect the discovery needed and that a delay in remanding the reversed common law claims awaiting that disposition is therefore unnecessary, we remand the negligence and defamation claims to the district court. *See Horta v. Sullivan*, 36 F.3d 210 (1st Cir. 1994). We of course retain jurisdiction of the CUTPA claim pending disposition of the certified question.

Order of the United States Court of Appeals for the Second Circuit dated March 8, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of March, one thousand nine hundred and ninety-six.

Present: HONORABLE RALPH K. WINTER,
HONORABLE PIERRE N. LEVAL,
HONORABLE GUIDO CALABRESI,
Circuit Judges.

ERIC ANTHONY ABRAHAMS,

Plaintiff-Appellant,

against

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a Robin Moore, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. McKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY, and ALEX KROLL,

Defendants-Appellees.

Order #94-7802

This appeal from the United States District Court for the District of Connecticut (Peter C. Dorsey, Chief Judge) came to be heard on the transcript of record from said district court and was argued by counsel. The dismissal of two claims has been affirmed. The dismissal of two claims has been reversed, and they have been remanded to the district court.

With regard to the remaining claim, based upon the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et. seq., we have severed it, and it is hereby ORDERED that the Clerk of the Court transmit to the Clerk of the Supreme Court of Connecticut a Certificate in the form attached, together with a complete set of briefs, appendices, and record filed by the parties with this court.

This panel retains jurisdiction over the severed claim so that, after we receive a response from the Connecticut Supreme Court, we may dispose of it. The parties are hereby ordered to bear equally such fees and costs, if any, as may be requested by the Connecticut Supreme Court.

So ordered.

s/Hon. Ralph K. Winter, U.S.C.J.
Hon. Ralph K. Winter, U.S.C.J.

s/Hon. Pierre N. Leval, U.S.C.J.
Hon. Pierre N. Leval, U.S.C.J.

s/Hon. Guido Calabresi, U.S.C.J.
Hon. Guido Calabresi, U.S.C.J.

Certificate to Connecticut Supreme Court Dated March 8, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of March, one thousand nine hundred and ninety-six.

Present: HONORABLE RALPH K. WINTER,
HONORABLE PIERRE N. LEVAL,
HONORABLE GUIDO CALABRESI,
Circuit Judges.

ERIC ANTHONY ABRAHAMS,

Plaintiff-Appellant,

against

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a Robin Moore, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. McKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY, and ALEX KROLL,

Defendants-Appellees.

Order #94-7802

Certificate to the Connecticut Supreme Court pursuant to Local Rule 0.27 and Connecticut General Statutes §51-199a.

1. The case concerns a complaint that alleges the following.

Defendant Young & Rubicam, Inc. ("Y & R") is a New York corporation engaged in the business of worldwide advertising. Various individuals are also named as defendants. All these individuals, except for Moore and Sturges, were employees and agents of Y & R. (The claims against Moore have been dismissed as waived.)

Plaintiff, Eric Anthony Abrahams ("Abrahams"), is a citizen and subject of Jamaica. From October 1980 to February 1989, Abrahams was an elected member of the Jamaican Parliament. In October 1980, Abrahams was also appointed Jamaican Minister of Tourism and Information and served in that position until about August 1984. In addition, Abrahams had served as the Jamaican Director of Tourism and as a consultant on international tourism and marketing with the Organization of American States. Following his service as Minister of Tourism, Abrahams acted as a consultant to various international businesses in Jamaica.

Unbeknownst to Abrahams, a scheme was concocted by Robin Moore, a writer, and Arnold Foote, Jr., a Jamaican advertising executive. Many activities in furtherance of this scheme took place within the State of Connecticut.

Messrs. Moore and Foote persuaded Y & R that bribes and kickbacks would have to be paid to Foote and to Abrahams to influence the decisions of the Jamaican Tourist Board ("JTB") to insure that Y & R would receive the lucrative JTB advertising account. During the course of the scheme, Y & R paid close to one million dollars ($1,000,000) in bribes to Moore and Foote. However, no money was ever paid to Abrahams, who neither demanded money nor was in a position to influence the award of the JTB contract.

In October 1989, the scheme was publicly exposed by a federal indictment (Cr. No. N-89-68-PCD), returned by a grand jury in Hartford, Connecticut. On February 9, 1990, Y & R pled guilty to knowingly and intentionally conspiring to pay bribes to influence the decision of the JTB in awarding its advertising account. Because Y & R and other defendants falsely implicated Abrahams in their scheme, Abrahams was also indicted. However, his indictment was later dismissed.

News regarding the criminal indictment of Y & R, including false statements by a number of defendants that depicted Abrahams as a criminal, was widely published. As a result, Abrahams's professional reputation was damaged, and his consulting business was destroyed. His personal reputation was also severely impaired, and he suffered severe emotional distress, humiliation, and depression.

2. The principal questions presented are whether the facts as stated above, if proven, constitute "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" within the meaning of Conn. Gen. Stat. §42-110b and whether Abrahams is "[a] person who [has] suffere[d] [a] . . . loss of money or property . . . as a result of the use or employment of [such] a method, act, or practice" within the meaning of Conn. Gen. Stat. §42-110g(a).

3. These questions should be decided by the Connecticut Supreme Court at this time because the issues involve defining the kinds of claims that may be properly asserted under the Connecticut Unfair Trade Practices Act. That definition will affect numerous other cases, and because there is no dispositive Connecticut caselaw, any resolution of the issues by a federal court might lead to considerable forum shopping.

FOR THE COURT
s/George Lange III, Clerk
George Lange III, Clerk

Decision of United States District Court, D. Connecticut
Decided June 26, 1992

Eric Anthony ABRAHAMS
v.
YOUNG & RUBICAM, INC., et al.
Civ. No. 5:91cv688 (PCD).

United States District Court,
D. Connecticut.

June 26, 1992.

Jamaican official brought action against various defendants allegedly responsible for his indictment. On defendants' motion to dismiss, the District Court, Dorsey, J., held that allegations of causation by Jamaican official who was indicted as result of alleged scheme to bribe Jamaican Tourist Board were insufficient to state civil Racketeer Influenced and Corrupt Organization Act (RICO) claim against persons involved in bribery scheme.

Motion granted in part and denied in part.

Robert P. Herzog, New York City, Eileen McGann, West Redding, Conn., for plaintiff.

Robert N. Chatigny, Hartford, Conn., Thomas D. Barr, Stephen S. Madsen, Frances M. Lynch, Cravath, Swaine & Moore, New York City, for defendants Young & Rubicam, Arthur Klein, Thomas Spangenberg, Steven M. McKenna, Mike Slosberg, Alex Kroll and Edward Ney and Edward J. Daley.

Robert L. Moore, pro se.

RULING ON MOTIONS TO DISMISS

DORSEY, District Judge.

Plaintiff, a citizen of Jamaica and formerly its Minister of Tourism and Information, brings this action against Young & Rubicam and several of its employees and their associates, alleging violations of 18 U.S.C. § 1961, *et seq.* ("RICO"); Conn. Gen Stat. § 42-110b ("CUTPA"); negligence; negligent infliction of emotional distress; intentional infliction of emotional distress; libel and slander. Defendants Young & Rubicam, Arthur Klein, Thomas Spanenberg, Steven McKenna, Mike Slosberg, Edward Ney, and Alex Kroll move to dismiss. Defendants Robert Lowell Moore and Edward Daley each move separately to dismiss.

Facts

The events giving rise to this action largely were those alleged in a criminal action in this court in 1990, *United States v. Young & Rubicam*, 741 F.Supp. 334. Plaintiff's allegations comprehensively repeat those in the indictment against Young & Rubicam and others and will not be restated herein in their entirety. The gravamen of the complaint is as follows: In October of 1989, Young & Rubicam and several of its officers were indicted for criminal racketeering stemming from an alleged scheme to pay bribes in order to influence the award of a multi-million dollar advertising contract with the Jamaican Tourist Board ("JTB"). Complaint ¶4. Plaintiff was also named in the indictment as the object of the alleged bribes, as was Arnold Foote, a Jamaican through whom Young & Rubicam allegedly funnelled payments to Abrahams. Complaint ¶¶4, 25. The scheme to bribe Abrahams was allegedly masterminded by Foote and Moore, who represented themselves as "consultants" to the Jamaican

government and who claimed to be able to obtain for Young & Rubicam the JTB advertising account given sufficient pay-offs to plaintiff. Complaint ¶11. In fact, plaintiff alleges, Moore and Foote concocted the scheme without his knowledge, keeping all bribes, and engaged in various acts with Young & Rubicam to conceal the scheme. Complaint ¶¶11, 64. Plaintiff contends that he had no knowledge of the conspiracy until the indictment was returned on October 6, 1989. Complaint ¶95. Plaintiff further argues that statements made by each of the defendants in memoranda circulated within Young & Rubicam, and subsequently to the government, were widely disseminated and led to eventual damage to his reputation and thus to his emotional, financial, political, and social status.[5] ¶¶Complaint 5, 189.

Discussion

A motion to dismiss involves a determination as to whether plaintiff has stated a claim upon which relief may be granted. That standard is articulated more fully in *Fischman v. Blue Cross Blue Shield*, 755 F.Supp. 528 (D.Conn.1990).

1. RICO Claims

[1] Defendants move to dismiss Counts I and II, alleging violation of RICO and conspiracy to violate RICO, 18 U.S.C. § 1962(c) and (d). In order to satisfy his pleading burden under RICO, plaintiff must first allege a violation of 18 U.S.C.§ 1962, the substantive RICO statute. *See Town of West Hartford v. Operation Rescue,* 915 F.2d 92 (2d Cir.1990). This requires:

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[5]On February 9, 1990, Young & Rubicam pled guilty to one count of conspiracy to bribe foreign officials. In return, all additional bribery and RICO charges against the remaining defendants, including plaintiff, were dropped. Complaint ¶92.

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate commerce.

Id., quoting *Moss v. Morgan Stanley, Inc.*719 F.2d 5, 17 (2d Cir.1983), *cert. denied,* 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984). Plaintiff must further allege that he was injured in his business and property by reason of a violation of S1962. *See id.*

[2] Plaintiff alleges no less than forty-one predicate acts allegedly committed by defendants in furtherance of their scheme to bribe and to conspire to bribe the JTB, all involving the underlying events for which defendants were indicted in the criminal proceeding. However, plaintiff must additionally allege in what way these predicate acts proximately caused injury to his business or property, a burden he has failed to satisfy in this instance. *See Sperber v. Boesky,* 849 F.2d 60, 64 (2d Cir.1988), quoting *Haroco, Inc. v. American Nat'l Bank & Trust Co.,* 747 F.2d 384, 398 (7th Cir.1984), *aff'd.* 473 U.S. 607, 105 S.Ct. 3291, 87 L. Ed.2d 437 (1985) ("'A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct,' but only to anyone whose injuries were caused 'by reason of a violation of section 1962.'"). Plaintiff clearly states that he knew nothing of the illegal activities of defendants until after the indictment was handed down and received no benefits from them. Plaintiff suggests unequivocally that it was the indictment against him, and the subsequent publicity, that caused injury to his reputation, to his business and political opportunities, and to his social standing. To the extent that plaintiff asserts a claim for indirect injury - that is, defendants' alleged acts caused the government to indict him, which caused his claimed injuries - the causal connection

is too tenuous to satisfy the element of proximate cause required by the statute. *See Sperber,* 849 F.2d at 65 ("Plaintiffs here were neither the target of the racketeering nor the customers of the racketeer. [Defendant] did not cheat or deceive plaintiffs in any way with regard to the particular stocks in question since they did not know he had purchased them illegally."); *Hecht v. Commerce Clearing House, Inc.,* 897 F.2d 21, 24 (2d Cir.1990) ("Although [plaintiff's] loss of employment may have been factually caused by defendants' RICO violations, it was not a foreseeable natural consequence sufficient for proximate causation."). Plaintiff claims that defendants engaged in a course of conduct allegedly intended to bribe him, as a result of which they and he were indicted. The result is the events and his asserted damages claimed herein. That result is not alleged to have been the intended, nor even foreseeable, result. Indeed, it is alleged that, except for Moore, the other defendants' scheme was to bribe plaintiff, i.e., that they intended, by their actions, to pay money, indirectly, to plaintiff. The scheme was discovered and plaintiff as well as defendants were prosecuted. As the indictment of plaintiff was not intended, nor was the indictment of any one, it cannot be said that defendants' conduct was a substantial factor reasonably foreseeable as likely to bring about plaintiff's indictment and his resulting damages. Plaintiff was neither the intended target nor victim of defendants' illegal activities.

What is not alleged is that defendants, except Moore, knew that plaintiff was not involved in the scheme, had no knowledge of it, and did not receive the money. The company and its employees would clearly have thought to the contrary. It is totally illogical that money be paid if the person for whom it was intended was not in fact involved. Plaintiff was a necessary participant for the payments to achieve their purpose, as he was the person who could deliver the JTB contract. Thus, it cannot be inferred that Young & Rubicam and its employees have

intended, or knew, that plaintiff would be indicted unjustifiably. Even if they should have foreseen indictments resulting from the scheme, their knowledge necessarily suggested that an indictment of plaintiff, if foreseeable, would have been justified, as they would seemingly have acted on the assumption that plaintiff was part of the scheme. That being the case, his indictment would not have been unjustified.

Further, the implication of plaintiff in the scheme, whether voluntarily or per force of the law enforcement investigation, simply demonstrated the clear belief of Young & Rubicam and its employees that plaintiff was the ultimate recipient of the alleged bribes, because they were led to so believe by Foote and Moore and because plaintiff was the person who could produce the intended purpose, delivery of the JTB contract. The United States Attorney credited the story attributed to Foote and Moore that plaintiff was involved, because that evidence was submitted to the Grand Jury. So also, the Grand Jury credited it and found probable cause to believe plaintiff was involved, leading to his indictment.

For all these reasons, plaintiff has failed to allege causation of his injuries by the commission of predicate, substantive RICO violations. Therefore, defendants' motion to dismiss Counts I and II is granted.

2. State Law Claims

[3] Plaintiff contends that defendants violated CUTPA through the commission of those same predicate acts alleged in Counts I and II. CUTPA provides, in relevant part, that:

> [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use of employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages.

Conn.Gen.Stat § 42-110g(a). Here, again, plaintiff fails to causally link the allegations of defendants' illegal activities, of which he allegedly knew nothing, with his alleged injuries. Absent allegations asserting the loss of money or property *as a result of* defendants' prohibited acts, the motion to dismiss Count III is granted.

Similarly, plaintiff's claims of negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress, Counts IV, V and VI[6], must also be dismissed for failure to allege causation. Although plaintiff claims that defendants knew, or should have known, that their illegal acts would cause harm and damage to plaintiff, it is once again the indictment and events surrounding it that resulted in plaintiff's harm. While it is clear that the decision by the United States Attorney to indict plaintiff cannot be the subject of a negligence or infliction of emotional distress claim, neither can defendants' original commission of illegal acts, for the reasons previously adduced, be denominated the proximate cause of plaintiff's emotional injuries. The motion to dismiss Counts IV, V and VI is, accordingly, granted.

[4-6] Plaintiff also sets forth claims of libel and slander in Counts IX and X against the Young & Rubicam defendants and in Counts VII and VIII against Moore individually. In order to establish a claim for defamation, plaintiff must demonstrate that defendant has published or uttered an unprivileged, false and defamatory statement. *See Strada v. Connecticut Newspapers, Inc.,* 193 Conn. 313, 477 A.2d 1005 (1984). Here, with respect to Counts IX and X, plaintiff refers to statements that were published or uttered initially through internal, private communications within Young & Rubicam, and subsequently to the investigating authorities in the United States Attorney's Office

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[6]In fact, plaintiff declines to address Count VI in its entirety in his memorandum in opposition to defendants' motion to dismiss.

or the Internal Revenue Service. To the extent that the first of these statements constitute the subject of plaintiff's claim, they are, by definition, non-public statements published in confidential memoranda or uttered between and among defendants alone and thus cannot appropriately comprise libelous or slanderous forms of speech. To the extent that plaintiff intends to draw the court's attention instead to statements made to the Internal Revenue Service, the Grand Jury, or the United States Attorney's Office, such statements made in the course of judicial proceedings are strictly privileged and are thus precluded from being the source of a libel or slander action. *See Petyan v. Ellis,* 200 Conn. 243, 510 A.2d 1337 (1986). As such, defendants' motion to dismiss Counts IX and X is granted.

Counts VII and VIII, however, while failing to clearly identify to whom or in what manner Moore's allegedly defamatory statements were disseminated beyond the confines of non-public circulation or to investigating authorities in the course of a criminal proceeding, suggest that plaintiff's claims against Moore are of a different nature than those against the Young & Rubicam defendants. Plaintiff refers, for example, to Moore's "written chronicles" distributed to the JTB, in addition to the defendants and to the United States prosecuting agencies. These communications do not clearly fall within either of the categories established above of non-public or privileged statements. Moore mistakenly relies on the Young & Rubicam memorandum in support of his motion to dismiss, although the parties are not similarly situated with respect to the allegations; additionally, defendant curiously raises a factual matter not appearing the complaint concerning a previous libel action by plaintiff against a Connecticut newspaper. Absent any refutation by defendant that the communications identified by plaintiff were either strictly non-public or strictly privileged, defendant's motion to dismiss Counts VII and VIII denied.

Conclusion

For the foregoing reasons, defendants' motions to dismiss Counts I, II, III, IV, V, VI, IX and X (documents #18 and #23) are granted. Defendant Moore's motion to dismiss Counts VII and VIII (document #43) is denied.

SO ORDERED.

(2)

No. 95-1932

Supreme Court, U. S.
FILED
JUN 28 1996
CLERK

IN THE

Supreme Court of the United States

October Term 1995

ERIC ANTHONY ABRAHAMS,

Petitioner,

v.

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a ROBIN MOORE, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. McKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY and ALEX KROLL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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June 28, 1996

QUESTION PRESENTED

Does the Second Circuit's decision to affirm the dismissal of Petitioner's RICO claims comport with this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)?

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IN THE

Supreme Court of the United States

October Term 1995

ERIC ANTHONY ABRAHAMS,

Petitioner,

v.

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a ROBIN MOORE, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. McKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY and ALEX KROLL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This matter has its origins in a criminal prosecution initiated in October 1989. *United States v. Young & Rubicam Inc.*, 741 F. Supp. 334 (D. Conn. 1990). There, the Government alleged that Young and Rubicam Inc. ("Y&R"), an advertising agency, and two of its employees, had violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, by bribing the Petitioner,

in his former capacity as Minister of Tourism of Jamaica, in order to obtain an advertising account of the Jamaican Tourist Board ("JTB"). Throughout the proceeding, Y&R maintained that it had never bribed Petitioner. Nonetheless, Petitioner was indicted, along with Y&R, for violating RICO.

In February 1990, the Government dropped its RICO charges against Y&R and its employees. Y&R pleaded guilty to a one-count information charging conspiracy to violate the Foreign Corrupt Practices Act in violation of 18 U.S.C. § 371. The Government later dismissed the indictment against Petitioner.

On October 7, 1991, Petitioner commenced a civil action against Y&R, several of its present or former employees, and two individuals who had been named as unindicted conspirators in the criminal action. Petitioner's complaint alleged essentially the same RICO scheme as had the Government's indictment, with one twist. Instead of claiming that Y&R had bribed him, Petitioner asserted that Y&R had *not* bribed him, but that he had nonetheless been injured "by reason of" the alleged scheme, within the meaning of 18 U.S.C. § 1964(c), because it had led to his indictment. Plaintiff also asserted claims for violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), for negligence and for defamation.

On June 26, 1992, the district court dismissed all of Petitioner's claims against Y&R and its employees. The court dismissed Petitioner's RICO claims on the ground that, as a matter of law, Petitioner had failed to satisfy his burden of showing that the alleged predicate acts proximately caused his alleged injuries. *Abrahams v. Young & Rubicam Inc.*, 793 F. Supp. 404, 406-07 (D. Conn. 1992). In documenting Petitioner's failure, the court noted that the complaint did not even allege that the purported RICO acts directly caused him any harm, and, instead, "suggest[ed] unequivocally that it was the indictment against him, and the subsequent publicity"

which caused his alleged injuries. *Id.* at 406. The court held that any claim for these indirect injuries was based on a causal connection "too tenuous" to satisfy the element of proximate cause under RICO. *Id.* The district court dismissed Petitioner's state law claims for similar reasons. *Id.* at 407.

On March 8, 1996, the United States Court of Appeals for the Second Circuit affirmed the dismissal of Petitioner's RICO claims. *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir. 1996). The court noted that "[t]he relationship between the predicate acts and [Petitioner's] injuries is analogous to that of other RICO plaintiffs to whom we have denied relief". *Id.* at 238. It found the causal link between the alleged RICO scheme and Petitioner's claimed injuries legally insufficient in that Petitioner's "injuries did not flow from the harms that the predicate acts— bribery, kickbacks, extortion, fraud—were intended to cause and the laws against them were intended to prevent". *Id.* Rather, the injuries, if any, resulted from the "fallout from the scheme's exposure". *Id.* at 239. Accordingly, the court affirmed the dismissal of the RICO claims and of certain other claims. *Id.* Holding that the causal analysis under RICO was not necessarily dispositive of the state law claims, the Court of Appeals certified Petitioner's CUTPA claim to the Connecticut Supreme Court and remanded his common law negligence and defamation claims to the district court for further proceedings. *Id.* at 239-240.

ARGUMENT

Both the district court and a unanimous panel of the court of appeals dismissed Petitioner's claims alleging violation of RICO and conspiracy to violate RICO. In each instance the court determined that Petitioner had failed to plead a sufficient causal connection between the alleged predicate acts and his claimed injury. There is nothing in that conclusion meriting, much less requiring, review by this Court. This outcome below represents a straightforward application of limitations on the breadth of RICO damages identified by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

Furthermore, the decision below is not in conflict with that of any other court of appeals. Thus a decision by this Court would not offer any substantial guidance to, or resolve any conflicts between, the lower courts. Nor does Petitioner contend that the Second Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power". Sup. Ct. R. 10(a).

I. THE SECOND CIRCUIT PROPERLY APPLIED *HOLMES*.

Petitioner's arguments stem from a fundamental misreading of the Second Circuit's decision. Petitioner asserts that, in deciding the case below, the Second Circuit "was faced with a situation where the application of traditional principles of proximate cause could only result in allowing recovery". (Pet. 6) As a result, he argues, the Second Circuit "abandoned the use of proximate cause as an analytical tool for determining whether illegal acts give rise to civil liability". (Pet. 5) This is not true. In fact, the Second Circuit

properly dismissed Petitioner's RICO claims using an analysis entirely in accord with *Holmes*.[1]

In *Holmes*, this Court held that RICO contained a proximate cause requirement, and discussed the parameters of that requirement. It focused on one element of proximate cause: the directness of the relationship "between the injury asserted and the injurious conduct alleged". 503 U.S. at 268. This requirement of a direct relation was held to generally preclude recovery by "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts". *Id.* at 268-69.

The Second Circuit had applied the proximate cause standard articulated in *Holmes* prior to this Court's decision. *See Sperber v. Boesky*, 849 F.2d 60, 63-65 (2d Cir. 1988) (holding that plaintiffs' injuries were not proximately caused by defendant's insider trading since plaintiffs were "neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer"); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (holding that plaintiff's loss of sales commissions was not proximately caused by defendants' RICO scheme since plaintiff was

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[1] The Second Circuit distinguished between proximate cause analysis as applied to common-law claims and statutory claims. After observing that the analysis in the two settings need not be coterminous, the Second Circuit noted that to show proximate cause in a suit on a statute the plaintiff must demonstrate (1) that he is within the class the statute sought to protect, and (2) that the harm done was one that the statute meant to prevent. 79 F.2d 234, 237. Contrary to Petitioner's assertion, this test did not signal an abandonment of the principle of proximate causation. As the court noted:

> The courts that have employed causation language have used that language *to ask precisely the same questions that we ask*—that is, was the plaintiff in the category of people meant by the statute to be safeguarded, and was the harm that which the act meant to avoid? *Id.* at 237 n.3 (emphasis added).

"neither the target of the racketeering enterprise nor the competitor[] nor the customer[] of the racketeer[s]") (citation omitted; brackets in original). Indeed, this Court cited the *Sperber* decision with approval in *Holmes*. 503 U.S. at 266 n.11. Following *Holmes*, the Second Circuit has continued to apply the proximate cause standard. In *In re American Express Co. Shareholder Litigation*, 39 F.3d 395, 400 (2d Cir. 1994), the court of appeals denied recovery to shareholders of American Express on the ground that they "were certainly not the intended targets of the RICO violations" that were alleged in that case but were injured "only because the scheme itself was exposed".

The Second Circuit properly applied the above precedents to the case at bar. Indeed, the court prefaced its discussion of Petitioner's RICO claims by noting that "[t]he relationship between the predicate acts and Abrahams's injuries is analogous to that of other RICO plaintiffs to whom we have denied relief".[2] 79 F.3d at 238. The court found that "Abraham's failure to establish a RICO claim stems from the fact that he was not 'the target of the racketeering enterprise'". *Id.* (citation omitted). His injuries were not proximately caused by defendants' actions since the "Y&R scheme was designed to corrupt the process by which the JTB advertising contract was let and to disadvantage Y&R's rivals for that contract". *Id.* Accordingly, "Abrahams was neither an intended target of the scheme nor an intended beneficiary of

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[2] The court made clear that the language it used in considering Petitioner's claim did not alter its analysis in any fundamental way:

> "It may therefore seem that the difference in ways of speaking is of no significance. In one sense, that is true. And the results of all the cases cited [*Holmes*; *American Express*; *Hecht*; *Sperber*] are completely consistent with the result we reach today." 79 F.3d at 237 n.3.

the laws prohibiting it". *Id.* Petitioner was only injured "by the fallout from the scheme's exposure". *Id.* at 239.

Petitioner also contends that the Second Circuit misapplied *Holmes*. He argues that he was, indeed, the "target" of the alleged bribery scheme and hence his injury was directly caused by the alleged predicate acts. (Pet. 6-7) This argument was made to the Second Circuit (*see* Motion of Appeal at 16-20; Reply Brief of Plaintiff-Appellant at 7-14) and rejected. Petitioner now contends, in essence, that application of the *Holmes* standard *should* have resulted in a ruling in his favor. A petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Petitioner identifies no reason for departing from that norm here, and there is none.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS.

Petitioner argues that the decision below conflicts with the decisions of other circuits. (Pet. 9) It does not.

Petitioner's misreading of the Second Circuit's decision has infected his argument regarding a circuit split. He cites cases from several circuits for their holding that RICO plaintiffs must prove proximate causation. (Pet. 9) The purported split derives from Petitioner's argument that the Second Circuit has abandoned proximate causation. As this claim is inaccurate, there is no split.

Petitioner also argues that the Second Circuit's holdings in *American Express*, *Hecht* and *Sperber*, which require proximate causation, are "strikingly different from those in other circuits". (Pet. 6) To support this argument, Petitioner cites three cases decided prior to this Court's decision in *Holmes*. Petitioner misstates the holding of one of these cases, *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988). The court there did not allow the plaintiffs to recover, but dismissed their complaint for lack of standing. *Id.* at 12-13. In the two

other cases cited, *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1984), *vacated*, 473 U.S. 922 (1985), and *Terre du Lac Ass'n v. Terre du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), the Eighth Circuit held that a plaintiff who was indirectly injured by a defendant's RICO violations could, consistent with the proximate cause requirement, seek damages under civil RICO. Petitioner fails to mention that in *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir.), *cert. denied*, 114 S.Ct. 81 (1993), a case decided after *Holmes*, the Eighth Circuit noted that "[a]ny inconsistencies that potential future applications of those decisions [*Alexander Grant* and *Terre du Lac*] may bring to light are, of course, foreclosed by the Supreme Court's holding in *Holmes*". 987 F.2d at 1325 n.4.

In short, what Petitioner has documented is the circuit split that led to *Holmes* rather than a new split that might warrant review by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

June 28, 1996

Respectfully submitted,

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APPENDIX A

APPENDIX A

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, respondent Young & Rubicam Inc. identifies the parent companies and non-wholly owned subsidiaries of Young & Rubicam Inc. as follows:

Yellow & Red S.r.l.; DY&R Advertising Company Ltd.; Media Buying Co.; Equmedia; Michael Hogg Y&R; Mediapolis; Commercial Presentations Group Ltd.; Horizons Media S.A.; Promovico Cato Johnson AG; Lumiere Sarl; Visser, Bay, Anders Toscani BV; Kulling & Partnner Design AG; CCCL (UK); Prima Europe Ltd; Corporate Vision Ltd. (UK); Comsult AG; DY&R Co. Ltd.; Trefpunt Sports & Leisure Marketing B.V.; Charles Barker GmbH (Germany); Wunderman Steiner AG; Mattingly & Partners Group Pty Ltd; Mattingly & Partners Holding Pty Ltd.; Mattingly & Partners Advertising Pty Ltd; Mattingly & Partners Advertising (NSW) Pty Ltd; William Roberts Advertising Pty Ltd; Total Media Aust Unit Trust; Gasworks Pty Ltd; Assembly Line Pty Ltd; Monahan Dayman Adams (Gold Coast) Pty Ltd; Stevens Tulk Dawson Advertising Pty Ltd; Issues Australia Pty Ltd; B.V. Arbeidsmarkt Communicatie Adviesbureau BV; DY&R Korea; Omo-Delta; Vinizius/Young & Rubicam SA; The Finished Type Inc.; DY&R Limited; Triangle Pacific Mkting & Promotion Ltd.; Oriental Source Premiums & Merchandise Ltd.; Amitel Italia S.r.l.; Marketing & Telematica S.r.l.; DY&R KK; DY&R DSH KK; Mattingly & Partners Advertising Auckland Ltd; Endicott Enterprises Limited; Agincourt Agency Limited; DY&R Alcantara; DY&R Advertising PTE LTD; DY& R Limited; Sudler & Hennessey/Gall Inc.; Firstcom Marketing Inc.; Dentsu Bm Co Ltd; Phoenix Travel (Mornington) Ltd; Orozco & Telmo Lda.; Y&R Czechoslovakia; Riechelmann, Lopes Cardozo & Van Bercum BV; Young & Rubicam Media Pro S.r.l.; G&R

Publicita - Sudler & Hennessey S.r.l.; Geo II Advertising S.A.; Y&R Damaris C Por A; Investigaciones Mercadeo C Por A; Team/Young & Rubicam Lda.; Consult Communications Strategy BV; Young & Rubicam Raklam AS (Reklamevi); Advico/Young & Rubicam AG; Sigma AG; Cato Johnson S.A.; MDLP; Verhoeff & Partners v.o.f.; FSD Y&R; Oy Taucher, Young & Rubicam Ab; Wunderman Worldwide v.o.f.; Cato Johnson v.o.f.; Studio 92; Le Projet (Pty) Ltd; Y&R South Africa Pty Ltd; Rayon Vert Conseil S.A.; Intramed Communications S.r.l.; Young & Rubicam Quest; Format Limited; Burson-Marsteller (Malaysia) Sdn Bhd; Creative Medical Communications S.r.l.; Walter Landor, Asociados SA; Y&R De Argentina Sa; B-M Thailand Ltd; Wunderman Wunderworld Mexico SA de CV; PI Participacoes S/C Ltda; Burson-Marsteller (Hong Kong) Ltd; B-M China Ltd; Cato Johnson Italia S.p.A.; Silverado S.r.l.; Burson-Marsteller S.A.; City & Corporate Counsel Ltd.; S&H Participacoes S/C Ltda; Young & Rubicam Espana S.A.; Wunderman Worldwide S.A.; Cato Johnson S.A.; Burson-Marsteller S.A.; Y&R/GSI LTD.; Y&R Zambia Ltd.